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# Supreme Court of the United States

**OCTOBER TERM, 1909.**

**No. 251.**

THE INTERSTATE COMMERCE COMMISSION,
*Appellant,*
vs.
ALPHEUS B. STICKNEY AND CHARLES H. F. SMITH, RECEIVERS OF THE CHICAGO GREAT WESTERN RAILWAY COMPANY, ET AL.,
*Appellees.*

## BRIEF OF APPELLEES.

WILLIAM D. McHUGH,
*Solicitor for Appellees.*

OMAHA PRINTING COMPANY, OMAHA, NEB.

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## BRIEF OF APPELLEES.

The proceeding in which the present appeal has been taken, was begun by the filing of a bill in equity by the appellees, as complainants, in the Circuit Court of the United States for the Eighth Circuit, against the Interstate Commerce Commission, appellant, for the purpose of suspending and annulling a certain order entered by the Interstate Commerce Commission, which order was in the words and figures following, to-wit, (See p. 8 of record):

> "It is ordered that the defendants, The Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago & Northwestern Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago & Alton Railroad Company; Chicago Rock Island & Pacific Railway Company; Atchison, Topeka & Santa Fe Railway Company; and Illinois Central Railroad Company, be, and they are hereby required to cease and

desist on or before the 1st day of February, 1908, from exacting for the delivery of live stock at the Union Stock Yards, in Chicago, Ill., with respect to shipments of live stock transported by them from points outside of that state, their present terminal charge of $2.00 per car.

"It is further ordered, that said defendants be, and they are hereby notified and required to establish and put in force on or before the 1st day of February, 1908, and apply thereafter during a period of not less than two years, for the delivery of live stock at the Union Stock Yards, in said Chicago, with respect to shipments of live stock transported by them from points outside the state of Illinois, a terminal charge which shall not exceed $1.00 per car, if any terminal charge is maintained by them."

An application was made in said action, upon due notice, for an interlocutory order suspending the order of the commission and enjoining its enforcement pending the trial of the cause. The said application came on to be heard before Judges Walter H. Sanborn, William C. Hook and Elmer B. Adams, Circuit Judges, and was argued upon the pleadings and showing duly filed. Upon consideration, the court unanimously decreed that the order of the Interstate Commerce Commission be suspended and its enforcement enjoined until the further order of the court.

From this interlocutory decree of the court, this appeal has been perfected under section 16 of the Interstate Commerce Act, as amended in 1906.

## STATEMENT OF FACTS.

The Chicago Great Western Railway Company, Chicago, Burlington & Quincy Railroad Company, The Illinois Central Railroad Company, Chicago & Northwestern Railway Company, Chicago, Milwaukee & St. Paul Railway Company, The Chicago & Alton Railroad Company, The Chicago, Rock Island & Pacific Railway Company and The Atchison, Topeka & Santa Fe Railway Company, appellees herein, are common carriers engaged in the transportation of property by railroad by continuous carriage of shipment from points in the States of Texas, Oklahoma, Kansas, Montana, North Dakota, South Dakota, Nebraska, Wyoming, Colorado and Indian Territory to Chicago in the State of Illinois, and have been so engaged for many years last past. The transportation of live stock from the states aforesaid to the City of Chicago is one of the important constituents in the business of said companies.

There have been established and exist in the City of Chicago, certain stock yards owned and operated by the Union Stock Yard & Transit Company, known as the Union Stock Yards, which consist of yards, pens and chutes, together with numerous and extensive buildings, and said Union Stock Yard & Transit Company also owns railway approaches to said stock yards aggregating about two hundred and forty (240) miles of railroad tracks, all of which are within the City of Chicago aforesaid; the said stock yards are the largest and most extensive in the United States and adjacent thereto are numerous extensive packing houses, and said stock

yards constitute the largest market for the sale and purchase of live stock in the United States.

The tracks of all of said railroad companies, appellees, terminate in the City of Chicago, and all have terminal facilities in said City of Chicago equipped for the business of said companies and sufficient for delivery of all freight consigned for delivery at such terminals; but none of the railroad tracks owned, controlled or operated by any of said appellees extend to or terminate at the said stock yards of the said Union Stock Yard & Transit Company; in order that appellees may deliver any cars of live stock at said Union Stock Yards, it is necessary that they use the lines of track of the said Union Stock Yard & Transit Company, and, in some instances, in addition thereto, the tracks of other companies.

Said appellees have established and duly filed, published and posted, according to law, tariffs of charges for the transportation of live stock to the City of Chicago, some of the said rates being for transportation of live stock entirely upon the lines of the company issuing said tariff and a large number of other tariffs being joint tariffs issued by appellees in connection with other companies, which other companies participating in such joint tariffs do not have lines reaching to the City of Chicago.

The delivery of live stock at the said Union Stock yards by appellees involves the distinct and special service by them, in said City of Chicago, of transporting the said live stock beyond the lines of their respective railways and over the lines of other railroad companies and over the tracks of the said Union Stock Yard & Transit Company, and the unloading of the said live stock at said Union Stock Yards.

Before the said Union Stock Yards were established, all live stock delivered in Chicago by appellees was delivered by each company at its own terminals on its own tracks; and the established rate for the transportation of live stock to Chicago included only the transportation to and delivery at the said terminals of the said companies on their own tracks in the said City of Chicago.

When the said Union Stock Yards were established and shippers of live stock desired the delivery of their live stock at the said Union Stock Yards, appellees did deliver such live stock at the said stock yards beyond the lines of their tracks, without making any special charge or receiving any special compensation for the said special service of transporting the same beyond the lines of the railways of appellees and delivering the same to the said stock yards; although the said Union Stock Yard & Transit Company charged and appellees paid twenty-five cents per car for unloading the said live stock at the said stock yards and said transportation and delivery beyond the lines of appellee's tracks without special charge or compensation was continued until 1894.

In 1894 the said Union Stock Yard & Transit Company imposed upon all of appellees a trackage charge for the use of its tracks in the transportation of live stock between the lines of the appellees' railroads and the said Union Stock Yards; said trackage charge varied in accordance with the distance traversed over said tracks, being in no case less than eighty cents per car and in some cases as high as one dollar and a half per car.

The increased expense involved in the delivery of live stock beyond the lines of appellees' tracks to said stock yards, by reason of the said imposition of said

trackage charges by said Union Stock Yard & Transit Company, and the enhanced complexity and general cost of such special service, made it impracticable for appellees longer to continue to make said delivery of said live stock beyond the lines of their respective railroad tracks without any special charge or compensation therefor; thereupon, appellees taking into account the charges exacted by the said Union Stock Yard & Transit Company, as aforesaid, and the expense to them of the transportation and delivery of said live stock beyond their lines to said stock yards, issued, published, filed and posted in all respects according to law their separate tariffs, showing that they would charge shippers of live stock the sum of two dollars per car in addition to the Chicago rate for transporting each car of live stock beyond the lines of their respective roads and making delivery thereof at said Union Stock Yards. The said provision of said tariffs was embodied in a joint circular, the same being as follows:

> "On and after June the 1st, 1894, a terminal charge of $2.00 per car will be made in addition to the Chicago rates as shown in the tariffs of the Western Freight Association on live stock and other freight received from or delivered to the stock yards or industries located on the tracks of the Union Stock Yards Railway, the Indiana Line Railway and the Northern Indiana Railroad."

The changes made in said tariffs were intended by appellees and their officers to mean, and appellees and their officers understood the said tariffs to mean, that the said charge of two dollars per car was the sole and only charge and compensation made or received by appellees for the service of transporting said cars of live

stock beyond the lines of their respective roads and making delivery of the same at said Union Stock Yards; and that said charge of two dollars per car for said service was segregated from and entirely separate from the charge in the tariffs for the transportation of said live stock from the points of the origin of the shipments to a delivery point on the tracks of appellees in the City of Chicago; and in making, issuing, publishing and filing the said terminal tariffs, appellees and their respective officers intended to provide, and believed that the said tariffs did provide and construed the said tariffs to provide that the charge made for the transportation of live stock from the points of origin of the shipments to the said City of Chicago was solely and exclusively for the service involved in the transportation of said live stock from said points of origin of the shipments to a point of delivery on the tracks of appellees, respectively, in the City of Chicago, and that the said last named charge did not cover or carry any compensation whatever for the transportation and delivery of such live stock beyond the lines of the railroads of appellees and did not cover or carry any compensation whatever for the transportation and delivery of said live stock from the lines of appellees in the City of Chicago to the said Union Stock Yards.

When the said tariffs were issued, published and filed in 1894, as aforesaid, there was no change made in the charge made in earlier tariffs for the transportation of live stock from the points of the origin of the shipments to the City of Chicago, and no change made in the joint rates or tariffs issued, published and posted by appellees in connection with other railroad companies, in so far as

the same fixed the charge for the transportation of live stock from the points of origin of the shipments to the City of Chicago, nor was there any change made in the division or the adjustment of the proportions of said charge made in said joint tariffs, between the companies issuing the same. And at no time was any joint rate agreed upon, issued, published or posted by appellees and other railroad companies for the transportation of live stock from the points of origin of the shipments to the City of Chicago wherein any division of the rates between the companies making the same was based upon any consideration whatever of the cost and expense of transporting such live stock beyond the tracks of appellees in the City of Chicago and making delivery thereof at the Union Stock Yards aforesaid.

Soon after the promulgation of the said circular and the publication of said tariffs, litigation arose respecting the validity of the said two dollar terminal charge. But as this litigation culminated in a decision of this court, (186 U. S. 320) in which all of the history of the controversy and the nature of the litigation mentioned was fully reviewed and clearly stated in the opinion, a cursory reference to the litigation will suffice for the present purpose. At the time of the promulgation of the said circular and the publication of the said tariff imposing the said $2 terminal charge, the Atchison, Topeka & Santa Fe Railroad Company was in the hands of receivers. An application was made to the court in which the receivership proceedings were pending, for an order requiring the receivers to desist from the imposition of said charge. This application came before the Circuit Court of Appeals for the Seventh Circuit and the application was,

by that court, dismissed, and the order prayed for, denied. (*Walker v. Keenan*, 73 Fed. 755.)

Afterwards, the Cattle Raisers' Association of Texas instituted a proceeding before the Interstate Commerce Commission complaining of the said $2 terminal charge as illegal. After full hearing that body held that as the railroad companies had for many years delivered live stock at the Union Stock Yards and beyond their own rails under their tariffs fixing the charge for the transportation of live stock from points of origin of the shipment to the City of Chicago, they had thereby construed their tariffs so as to make the charge, therein imposed, carry compensation for the entire transportation of live stock from the points of origin to the Union Stock Yards, aforesaid; and while that body held that the $2 terminal charge did not exceed the cost of this service of transporting the live stock from the rails of the companies in the City of Chicago to the Union Stock Yards and there making delivery thereof, yet when the sum of $2 per car was added to the compensation already laid in their tariffs for that service, the same was excessive. In other words, the Commission held that while the $2 terminal charge, if considered by itself as a separate charge for the separate service of transporting the live stock beyond the rails of the companies to the Union Stock Yards and there making delivery thereof, was reasonable and proper, yet, under the tariffs of the companies as published, the terminal charge could not be so separately considered.

The Commission, therefore, held that the $2 charge was unreasonable, and that any charge in excess of $1.00 per car was unreasonable. And the carriers were thereupon ordered to desist from making any terminal charge in excess of $1.00 per car.

The railroad companies refusing to obey this order of the Commission, suit was begun to compel compliance therewith. The proceeding was dismissed upon its merits by the Circuit Court, and on appeal the decree of the Circuit Court was affirmed by the Circuit Court of Appeals. The case was then taken to this court where the matter was fully considered and an elaborate opinion filed in which the facts relating to the controversy were fully and clearly set forth. (See *I. C. C. v. C., B. & Q. R. R. Co., et al.*, 186 U. S. 320.)

This court, upon full argument, decided that the railroad companies had the legal right to segregate their charge for the separate service of transporting cars of live stock beyond the lines of their tracks to the said Union Stock Yards, and there making delivery thereof, from the charge for the transportation of said live stock from the point of origin to the City of Chicago. But the court, examining the provisions of the said tariffs as embodied in the said circular, decided that in view of the long continued usage and practice of the railroad companies in transporting live stock to the Stock Yards aforesaid, and there making delivery thereof for the charge fixed in their tariffs for the transportation of such live stock to the City of Chicago, the carriers had placed a construction upon the said tariffs to the effect that the transportation charge as laid in said tariffs for the transportation to the City of Chicago included compensation for the service of delivering the same beyond the lines of the respective companies and to the said Stock Yards; and that the joint and circular tariffs aforesaid, constituted merely the making of an additional charge for a service already covered by the charge laid in the tariffs. This court, there-

fore, holding that addition was not division, decided that the imposition of the additional $2 charge as made by the said tariffs and circular, was not in effect a segregation of the transportation charge to the City of Chicago from the terminal charge from the tracks of the companies to the said Stock Yards. In other words, although this court held that the railroad companies had the right to segregate these two charges for the two separate services, they had not, in the said circular and tariffs, done so.

Moreover, the court having held that the tariff provisions embodied in the circular merely added $2 to the charge for the aggregate service of transporting live stock from points of origin to the said Union Stock Yards, the reasonableness thereof must be considered in the light of all of the circumstances surrounding the said aggregate charge. And, it having appeared from the report of the said Commission that the aggregate charge for such transportation had been reduced from certain undisclosed territory, it followed that the aggregate charge as increased by the $2 charge might not be unreasonable as related to the territory within which the said reductions had been made; and as the record did not disclose the boundaries of such territory the decree of the court of appeals was affirmed, it being provided that nothing in the decree should be construed so as to prevent the Interstate Commerce Commission from commencing proceedings to correct any unreasonableness in the rate resulting from the additional terminal charges as to any territory to which the reduction referred to in the opinion, did not apply.

Promptly upon the announcement of the said decision by this court, the railroad companies, appellees, proceeded to revise their tariffs for the transportation of live

stock, so as to divide their rates and to segregate definitely and beyond possibility of doubt, their charge for the terminal service of transporting live stock from their terminals to the said Stock Yards and there making delivery, from their charge for the transportation of such live stock from the points of origin to the terminals of the said railroad companies in the City of Chicago. One separate and distinct charge, was in said tariffs plainly laid for the separate service of transporting live stock from the points of origin to the terminals of said companies in Chicago; and one separate and distinct terminal charge of $2 per car was, in said tariffs, plainly laid for the separate service of transporting said cars of live stock beyond the tracks of said companies in Chicago to the said Stock Yards, and there making delivery thereof. The tariff of the Chicago & Northwestern Railway Company as published, subsequent to and pursuant to the decision of this court, above mentioned, provided as follows:

> "The live stock station and stock yards of this company in Chicago are located at Mayfair, and the rates named herein apply only to live stock intended for delivery at, or received and transported from the stock yards of the Company at Mayfair, in Chicago.
>
> "Upon all live stock consigned to or from the Union Stock Yards in Chicago, or industries located on the Union Stock Yards Railway or the Indiana State Line Railway, and transported and delivered to or received and transported from said Union Stock Yards or said industries located on said Union Stock Yards Railway, or the Indiana State Line Railway, aforesaid, a charge of two dollars ($2.00) per car will be made for the special and separate service of transporting such cars to said Union Stock Yards, or to said industries on said Union Stock Yards Railway, or the Indiana State

> Line Railway, from this company's own rails, or of transporting such cars from said Union Stock Yards or said industries on said Union Stock Yards Railway, or the Indiana State Line Railway to this company's own rails."

The other railroad companies, appellees, filed similar modifications to their tariffs, and all effected the segregation of the two charges in such manner that the charge laid in the said tariffs for the transportation of live stock from the points of origin of the shipments to the point of delivery upon the tracks of the said railroad companies respectively in the City of Chicago, was laid and collected, solely and exclusively for the service rendered in transporting such live stock from points of origin of the shipment to the point of delivery upon the tracks of said railroad companies respectively in the City of Chicago; and the charge laid in said tariffs for the transportation and delivery of live stock beyond the tracks of said railroad companies and to the said Union Stock Yards was laid and collected solely and exclusively for the service of transporting such live stock beyond the tracks of such railroad companies and delivering the same at the Union Stock Yards.

These provisions in the said tariffs have been constantly maintained in all the published tariffs of the railroad companies relating to the transportation of live stock, and are now being maintained in all the tariffs in force issued, filed, published and posted by the appellees.

Thus, from the time of the said decision of this court to the present time, there has been a complete segregation and separation under the tariffs of appellees for the transportation of live stock, of

the charge laid in the said tariffs for the transportation of live stock from the points of origin of the shipments to a point of delivery on the tracks of said companies in the City of Chicago, from the charge laid in said tariffs for the transportation and delivery of said live stock beyond the tracks of said companies in the City of Chicago to the Union Stock Yards aforesaid; with the result that during all of said years, the charge laid in the said tariffs for the transportation of live stock from the points of origin of the shipments to the point of delivery upon the tracks of said companies in the City of Chicago, was laid and collected solely and exclusively for the service rendered in transporting such live stock from the points of origin of the shipments to the point of delivery upon the tracks of said companies in the City of Chicago; and the charge laid in said tariffs for the transportation and delivery of live stock beyond the tracks of said companies and to the Union Stock Yards aforesaid, was laid and collected solely and exclusively for the service of transporting such live stock beyond the tracks of said company and delivering the same at the Union Stock Yards, aforesaid.

Moreover, the railroad companies actually separated the moneys received under these separate charges; all the moneys received for the transportation of live stock from the points of origin of the shipments to the terminals of said companies in the City of Chicago was entered into the account of freight earnings; while the revenue from the $2 terminal charge was entered in another account and credited to miscellaneous earnings or switching charges.

Thereafter, the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange filed a petition with

the Interstate Commerce Commission, and prayed that body to re-open the case, hear further evidence and order the railroad companies to desist from the imposition of the $2.00 charge. The case was accordingly reopened and leave given to introduce further testimony. After full hearing, the Interstate Commerce Commission entered an order requiring the railroad companies to desist from the imposition of the $2.00 charge with respect to all except certain defined territory. This order was made August 16th, 1905; the order was not obeyed, and no proceedings whatever were begun for its enforcement.

In June, 1906, the Interstate Commerce Act was amended by the passage of what is known as the Hepburn Act; and on December 3rd, 1906, the Cattle Raisers' Association of Texas and the Chicago Live Stock Exchange filed a petition with the Interstate Commerce Commission alleging that the imposition of the $2.00 terminal charge was unlawful, and praying that the commission order the carriers to desist from making any terminal charge whatever for said service, or, if in the opinion of the Commission such charge might be made, then that the commission fix the amount of such charge. The manifest purpose of the proceeding was to gain the benefit of the increased authority conferred upon the Interstate Commerce Commission by the amendment of the Interstate Commerce Law.

After full hearing the Interstate Commerce Commission adhered to its former holdings in the matter; it found that the cost to the railroad companies of transporting the live stock from the tracks of said companies to the stock yards and there making delivery thereof, was more than the sum of $2.00 per car. But it held that the

reasonableness of this terminal charge should not be considered by itself, but in connection with the charge made for the transportation of such live stock from the points of origin to the terminals of the railroad companies in the City of Chicago; and that, so considering the said terminal charge in connection with the transportation charge, the Commission decided that a terminal charge of $2.00 per car was unreasonable, but that a terminal charge of $1.00 per car was reasonable.

The Commission ordered the railroad companies to desist from the imposition of the charge of $2.00 per car for the terminal service, and ordered them to charge not more than $1.00 per car for such service.

Thereupon, the carriers instituted this proceeding by the filing of a bill in equity to secure the cancellation of the said order and an injunction restraining its enforcement. Answer was filed by the commission, to which replication was duly filed; an application was made for an interlocutory order suspending the order of the commission and enjoining its enforcement pending the trial of the cause. Affidavits were filed in support of the application setting forth the tariffs of the various companies, whereby the segregation above mentioned was effected, and also showing how the railroad companies carried the two charges separately upon their books. Due notice of the application was given, pursuant to the statute, and the same came on regularly before three of the Circuit Judges of the Eighth Circuit. The unanimous opinion of the judges was to the effect that the railroad companies had a right to segregate their charge for the terminal service of transporting the live stock beyond their tracks to the said stock yards and there

making delivery thereof, from their charge for the transportation of the live stock from the points of origin to their terminals in the City of Chicago. The judges further held that the railroad companies had, by their tariffs, segregated these charges. The judges further held that the terminal charge of $2.00 per car was reasonable, since it was conceded by the Commission that the cost to the carriers of the special service for which the charge was made was more than the said charge of $2.00 per car.

The court thereupon entered an interlocutory order or decree suspending the said order of the Interstate Commerce Commission and enjoining its enforcement pending the further order of the court. From this interlocutory order or decree, this appeal has been perfected to this court.

## ARGUMENT.

This case presents for decision but three questions:

1. Have the railroad companies, appellees, the legal right to segregate their charge for the transportation of live stock beyond their terminals in the City of Chicago over the tracks of other companies to the Union Stock Yards Company and there make delivery thereof, from their charge for the transportation of such live stock from the points of origin to their terminals in the City of Chicago?

2. Have the railroad companies, appellees, exercised this right and segregated the said charges?

3. Is the separate terminal charge of $2.00 per car imposed for the separate service of transporting live stock from the terminals of the railroad companies

in the City of Chicago over the tracks of other companies to the Union Stock Yards and there making delivery thereof, a reasonable charge for such service?

The questions will be considered in the order named.

## I.

**Railroad companies have a legal right to divide their rates and thus make a definite charge for transportation from the points of shipment to Chicago, and a separate terminal charge for delivery to the Stock Yards, a point beyond the lines of the respective carriers.**

This proposition has been definitely and decisively determined by this court. In the case of *Interstate Commerce Commission v. C., B. & Q. R. R. Co.*, 186 U. S. 320 (p. 335) the court say:

> "As the right of the defendant carriers to divide their rates and thus to make a distinct charge from the point of shipment to Chicago and a separate terminal charge for delivery to the stock yards, a point beyond the lines of the respective carriers, was conceded by the Commission and was upheld by the Circuit Court of Appeals, no contention on this subject arises. If, despite this concurrence of opinion, controversy was presented on the subject, we see no reason to doubt, under the facts of this case, the correctness of the rule as to the right to divide the rate, admitted by the Commission and announced by the court below. This is especially the case in view of the sixth section of the act to regulate commerce, wherein it is provided that the schedules of rates to be filed by carriers shall 'state separately the terminal charges and any rules or regulations which could in any wise change, affect or determine any part of the aggregate of said aforesaid rates and fares and charges.'"

## II.

**The railroad companies have divided their said rates and have made a distinct charge for transportation from the points of shipment to Chicago, and a separate terminal charge for delivery to the stock yards, a point beyond the lines of the respective carriers.**

This fact is clear from the tariffs of the railroad companies in evidence in this case. The provision in the tariff of the Chicago & Northwestern R. R. Company is as follows (see p. 20 of Record):

> "The live stock station and stock yards of this company in Chicago are located at Mayfair, and the rates named herein apply only to live stock intended for delivery at or received and transported from the stock yards of the company at Mayfair, in Chicago.
>
> "Upon all live stock consigned to or from the Union Stock Yards in Chicago or industries located on the Union Stock Yards Railway, or the Indiana State Line Railway, and transported and delivered to or received and transported from said Union Stock Yards or said industries located on said Union Stock Yards Railway, or the Indiana State Line Railway aforesaid, a charge of two dollars ($2.00) per car will be made for the special and separate service of transporting such cars to said Union Stock Yards or to said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, from this company's own rails or of transporting such cars from said Union Stock Yards, or said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, to this company's own rails."

The tariff of the Chicago & Alton R. R. Company is, on its face, a tariff applying only on live stock in car-

loads, between stations outside of Illinois and "Brighton Park (Chicago) Ill.," and in said tariffs is the following provision (p. 95 of record):

"Application of Rates.

"Shipments to and from the Union Stock Yards district, Chicago.

"Shipments consigned to or received from Union Stock Yards, Chicago, Ill., or industries located on the tracks of the Union Stock Yards Ry. will, in addition to the rates named in this tariff, be subject to a delivery charge of $2.00 per car, and $1.50 per car on shipments received from or delivered to the Northern Indiana R. R. at Hammond, Ind.

"Agents must insert the above charge in all shipping receipts, bills of lading, waybills, and stubs; or live stock contracts for shipment consigned to or coming from industries specified, showing same as a separate item in addition to the tariff rate to or from Brighton Park.

The provision in the tariffs of the Chicago, Rock Island and Pacific Railway Company is as follows, (p. 95 of record):

"94th Street Stock Yards, Chicago, Ill. The rails of Chicago, Rock Island & Pacific Railway do not reach Union Stock Yards, Chicago, Ill. The C., R. I. & P. Stock Yards at Chicago, Ill., are located at 94th street, and the Chicago rates named herein cover transportation charges between stations named and C., R. I. & P. 94th Street Stock Yards.

"Shipments to or from Union Stock Yards, etc. Charges as follows must be made in addition to the regular tariff rates on all C. L. shipments of freight (except on dressed beef and packing house products) received from or delivered to industries located on the tracks of the following roads:

"Chicago Junction Ry. (Union Stock Yards and Indiana State Line Divisions), Chicago, $2.00 per car.

"Northern Indiana R. R., Hammond, Ind., $1.50 per car.

"Agents should be particular to see that shipments are waybilled to the Union Stock Yards, Chicago, or to Washington Heights (when for 94th Street Stock Yards) as directed by shippers."

The provision in the tariffs of the Illinois Central Railway Company, is as follows (p. 96 of record):

"To and from Union Stock Yards.

"The rates on live stock, carloads, published in tariff, as amended, to and from Chicago, Ill., will apply when delivered to or shipped from this company's stock yards at Hawthorne, Ill., or Fordham, Ill., and do not include the cost of delivery to or from the Union Stock Yards, Chicago, Ill.

"The terminal charge provided for in I. C. R. R. Tariff No. 1-A, I. C. C. No. A-5950 or subsequent issues, will be assessed in addition to the rates published in this tariff on live stock, carloads, delivered in or shipped from the Union Stock Yards, Chicago, Ill.

"Agents will insert in live stock contracts for shipments destined to or shipped from the Union Stock Yards, the additional terminal charge referred to in the foregoing paragraph, as provided in I. C. R. R. Tariff No. 1-A, I. C. C. No. A-5950 or subsequent issues (File M-320-U. S. Yds.)"

The tariff of the Chicago, Milwaukee & St. Paul Railway Company is on its face a tariff between "Chicago, Ill. (Galewood Stock Yards)" and other stations and contains the following provision, (p. 96 of record):

"Terminal charge.

"Note—This company's railway does not reach the Chicago Union Stock Yards, and the rates given herein cover the transportation charges between the stations named and Galewood, Ill., Stock Yards, only. $2.00 per car in addition will be charged on

> live stock, carloads, when consigned to or from the Chicago Union Stock Yards. This terminal charge must be entered separately by waybilling agent in 'freight charge' column of waybill, also inserted on bill of lading and live stock contract."

The tariff of the Chicago, Burlington & Quincy Railroad Company is on its face a tariff of live stock between "Chicago, (Company's Stock Yards at Hawthorne)" and other stations. Throughout the said tariff, wherever the word "Chicago" is used, attention is called, by reference, to a foot note reading as follows:

> "These rates apply only to and from company's stock yards at Hawthorne, Ill. See last note, page 69, for further information."

On page 69 of said tariff is the following provision (p. 96 of record):

> "Live stock to or from Union Stock Yards, Chicago, Ill.
>
> "The rates herein published do not include delivery in Union Stock Yards, Chicago, Ill., and live stock under these rates will be delivered to and taken from the company's stock yards at Hawthorne, Ill.
>
> "In case delivery is desired in the Union Stock Yards, Chicago, or shipments are made therefrom, a terminal charge of $2.00 per car will be made for that service which will be added to the rates herein published to and from Chicago.
>
> "Agents in issuing live stock contracts for shipments destined to or from Union Stock Yards must insert the terminal charge in live stock contract, in addition to the rate to and from Chicago."

The tariff of the Atchison, Topeka & Santa Fe Ry. Co. is on its face a tariff of live stock between certain stations and "Chicago (Corwith Station)" the said tariff contains the following provisions (p. 97 of record):

"Important—Terminal charges.

"The live stock station and stock yards of the A., T. & S. F. Ry. Co., in Chicago, are located at Corwith, and the rates named herein as applicable to Chicago, only apply to live stock intended for delivery at the stock yards of said company at Corwith in said city.

"Upon all live stock consigned to the Union Stock Yards in Chicago or to industries located on the Union Stock Yards Railway or the Indiana State Line Railway (Chicago Junction Railway, lessee), and transported and delivered to said Union Stock Yards or to said industries located on said Union Stock Yards Railway or the Indiana State Line Railway aforesaid, an additional charge of two dollars ($2.00) per car will be added to the rates applicable to Corwith, for transporting such to said Union Stock Yards or to said industries on said Union Stock Yards or the Indiana State Line Railway, for delivery thereat; and one dollar and a half ($1.50) per car as a terminal charge will be made in addition to the Chicago rates on shipments received from or delivered to the Northern Indiana Railroad at Hammond.

"The attention of the shipper must be and is called to the fact that the transportation charge on live stock delivered at our own yards at Corwith in Chicago will be two dollars ($2.00) per car less than when delivered at the Union Stock Yards at Chicago, or at industries located on the Union Stock Yards Railway or the Indiana State Line Railway, and the agent should ascertain definitely at which point the shipper desires delivery to be made. The live stock contract must then be filled out so as to show the correct destination and rate as provided by the tariff and amendments.

"Care must also be taken to have the stock correctly billed, either to Corwith in Chicago, or Union Stock Yards at Chicago, or industries located on the Union Stock Yards Railway or the Indiana State Line Railway as designated by the shipper, and the correct rate shown in the billing.

"Bills of lading covering freight to and from the Union Stock Yards, or industries located on

> the Union Stock Yards Railway or the Indiana State Line Railway must provide for the above terminal charges.
>
> "In waybilling shipments destined to or coming from the Union Stock Yards, etc., the terminal charges if any, must be shown separately in the freight column."

It further appears from the waybills added as exhibits to the various affidavits filed in this case, that the item of $2.00 for the terminal service of the railroads is entered separately from the freight charge. (Pages 21-32 of record): And it further appears from the affidavits of Kirkman (page 21 of record), Krebs (page 23 of record), Sturgis (page 29 of record) and Bailey (page 31 of record), that, upon the books and accounts of the companies named, the revenues received from the $2.00 terminal charge are credited to miscellaneous earnings or switching earnings, while the revenues received from the charge for transporting the live stock to the terminals of the companies in Chicago, are credited to freight earnings.

It appears that, after the decision of this court in the case above mentioned, and pursuant to that decision, the railroad companies have distinctly and in unequivocal terms divided their rates, and thus made a distinct charge for the transportation from the point of origin of shipment to their respective terminals in Chicago, and a separate terminal charge for delivery beyond their lines to the stock yards. Clearer or more unequivocal language could not be used to effectuate this purpose.

## III.

**The separate terminal charge of $2.00 per car made by the railroad companies for the delivery by them of live stock to the Stock Yards, a point beyond the lines of their respective railroads is not excessive since it is less than the actual cost to the railroads for the performance of such service.**

No contention was made in the court below, that the charge of $2.00 per car for the terminal services mentioned is unreasonable if considered as a separate charge for a separate service; and we presume no such contention will be made in this court. As was said by the learned judge in the opinion of the court below, (p. 89 of record), "Neither the commission in its reports nor learned counsel in their arguments attempted to justify the reduction on the ground that the charge as actually laid was too much for the particular service rendered, etc."

The Interstate Commerce Commission, in its various decisions with respect to this matter, has repeatedly found that the $2.00 terminal charge, if considered as a separate charge for a separate service, was reasonable. The commission distinctly says that the order was not entered "because $2.00 was an unreasonable charge for transporting a car to the stock yards if that service was performed by some independent agency." (See foot note to 186 U. S. 332.)

There is no need of reviewing the decisions of the commission upon this point, all of which were re-affirmed in the opinion upon the last hearing, since this court has,

from a reading of the said opinion, stated the findings and conclusion of the commission as follows (186 U. S. 326):

> "Considering the cost of delivery to the Stock Yards over the rails of the Stock Yards Company, including the sum paid for trackage and all other expenses, the Commission found as a matter of fact that $2 per car would be just and reasonable. A reference to this subject, found in the report of the Commission, is excerpted in the margin."

In its last opinion the Commission said (page 48 of record):

> "The original case did not show the cost of making delivery of other kinds of carload freight at this market, but the present record shows that the average cost to one defendant, the Atchison, Topeka & Santa Fe Railway Company, of delivering all kinds of carload freight, including live stock, is $5.40 per car, while the cost of delivering live stock is not far from $2 per car. The testimony further indicates that the average cost of delivering all kinds of carload freight does not differ much in the case of the Santa Fe from that in the case of the other defendants, although it does appear that several of the defendants are at greater expense than $2 per car in making delivery of live stock at the stock yards. We think it fairly appears upon this record that the total cost to these defendants delivering live stock at the Union Stock Yards, including the trackage charge, is not much, if any, above one-half the average cost of handling all carload freight in the City of Chicago."

That a railroad company is entitled to reasonable compensation for a separate service for which a separate charge is lawfully made, is settled by the recent decision of this court in *Southern Railway Company v. St. Louis Hay & Grain Company*, 214 U. S. 297.

We therefore submit that as the appellees, railroad companies, had a lawful right to divide their rates and make a distinct charge for the transportation of live stock from the point of shipment to their terminals in Chicago, and to make a separate terminal charge for the service of delivering live stock to the stock yards, a point beyond the lines of the appellees; and inasmuch as the appellees have so divided their rates and have made a separate and distinct charge for the separate and distinct service of transporting live stock from their terminals to the Union Stock Yards over the tracks of other companies and there making delivery thereof; and inasmuch as this separate terminal charge for this separate terminal service is, without dispute, just and reasonable, it follows that the order of the Interstate Commerce Commission was unlawful and should be set aside.

We respectfully refer the court to the elaborate and unanimous opinion of the three circuit judges who heard the case in the court below, which opinion is found on pages 86 to 93 of the record.

All of which is respectfully submitted.

WILLIAM D. MCHUGH,
*Solicitor for Appellees.*

# In the Supreme Court of the United States

October Term, 1909

[redacted]

Appellants,

[redacted]

Appellees.

[redacted]

# In the Supreme Court of the United States.

OCTOBER TERM, 1909.

| | |
|---|---|
| INTERSTATE COMMERCE COMMISSION, Appellant, *v.* ALPHEUS B. STICKNEY AND CHARLES H. F. Smith, receivers of the Chicago Great Western Railway Company et al. | No. 251. |

**APPELLANT'S REPLY TO BRIEF OF WALKER D. HINES, OF COUNSEL FOR APPELLEES.**

## I.

Counsel for the appellees in the brief take the position that the facts of the case are different from what they were when the case was before this court in *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy R. R. Co.* (186 U. S., 320) because of the change in the language of the tariffs so as to limit the application of the through rate to the stock pens alleged to exist on the rails of each of the appellees; that thereby the appellees divided their rate so that the $2 is the sole charge for the transportation from appellees' tracks to the Union Stock

Yards, and no part of the compensation embraced in the through rate is for any part of the service from their own pens to the Union Stock Yards, or for delivery expenses thereat.

Our reply to this is that the allegations of the bill dispute the contention that no part of the through rate embraces pay for any part of the service beyond the line of their rails or for delivery at the Union Stock Yards.

At page 3 it is alleged in the bill:

> That, in order that your orators may deliver any cars of live stock at said Union Stock Yards, it is necessary that your orators use the lines of track of the said Union Stock Yard and Transit Company, and in some instances, in addition thereto, the tracks of other companies.

And at page 9 it is alleged:

> Your orators further aver that the actual cost to each of your orators of the service of transporting cars of live stock beyond the tracks of your orators in the city of Chicago to the Union Stock Yards aforesaid and there making delivery thereof *exceeds, and ever since 1894 has exceeded, in each instance the sum of two dollars per car, the present terminal charge therefor*, and that under the present tariff and charge of two dollars per car for the said service your orators and each of them are now rendering the said service to shippers of live stock delivered at said Union Stock Yards of transporting the said cars of live stock beyond

> the tracks of your orator in Chicago to the Union Stock Yards, and there making delivery thereof at a *charge less than the actual expense* to your orators, respectively, necessarily incurred in the performance of the said service. (Italics ours.)

And again, on page 9, it is alleged that—

> The said order prohibits your orators from charging for the service aforesaid the said sum of two dollars per car, as above set forth, *which is less than the actual expense to your orators necessarily incurred in the performance of the service for which, as aforesaid, the said charge is laid.* (Italics ours.)

This court held unequivocally and the commission held that the through rate did comprehend the cost of delivery at the Union Stock Yards and that it would be conclusively presumed that no part of the service was performed as *a gratuity*. As to the soundness of that proposition there can be no doubt. It therefore is shown from the allegations of the bill just mentioned that some part of the expense is embraced in the through rate.

And again it is alleged in the bill (see p. 4 of the record):

> Your orators further aver that when the said Union Stock Yards were established and shippers of live stock desired the delivery of their live stock shipped over the lines of your orators' railways at the said Union Stock Yards, your orators did deliver such live stock at the said stock yards beyond the lines

of your orators' tracks *without making any charge or receiving any compensation for the said special service of transporting the same beyond the lines of your orators' railways and delivering the same to the said stock yards,* although the said Union Stock Yard and Transit Company charged your orators, and your orators paid, 25 cents per car for unloading the said live stock at the said stock yards; and said transportation and delivery beyond the lines of your orators' tracks *without charge or compensation was continued until 1894.*

And again it is alleged (at p. 5 of the Record):

> Your orators further aver that the increased expense involved in the delivery of live stock beyond the lines of your orators' tracks to said stock yards, by reason of the said imposition of said trackage charges by said Union Stock Yard and Transit Company and by reason of enhanced complexity and general cost of such special service, made it impracticable for your orators longer to continue to make said delivery of said live stock beyond the lines of their respective railroad tracks without any charge or compensation therefor.

The bill then sets out one of the tariffs of May 19, 1894, and alleges that:

> Said tariffs were intended by your orators and their officers to mean, and your orators and their officers understood the said tariffs to mean, that the said charge of $2 per car was the sole and only charge and compensation made or received by your orators for

> the service of transporting said cars of live stock beyond the lines of their respective roads and making delivery of the same at said Union Stock Yards; * * * (See Record, pp. 5, 6.)

And further it is alleged:

> That the charge made for the transportation of live stock from the points of origin of the shipments to the said city of Chicago was solely and exclusively for the service involved in the transportation of said live stock from said points of origin of the shipments to a point of delivery on the tracks of your orators, respectively, in the city of Chicago, and that the said last-named charge did not cover or carry any compensation whatever for the transportation and delivery of such live stock beyond the lines of the railroads of your orators and did not cover or carry any compensation whatever for the transportation and delivery of said live stock from the lines of your orators in the city of Chicago to the said Union Stock Yards. (See Record, p. 6.)

It was further alleged:

> That when the said tariffs were issued, published, and filed in 1894, as aforesaid, there was no change made in the charge made in earlier tariffs for the transportation of live stock from the points of the origin of the shipments to the tracks of the railroads of your orators in the city of Chicago, and no change made in the joint rates or tariffs issued, published, and posted by your orators in connection with other railroad companies. * * * nor was

> there any change made in the division or the adjustment of the proportions of said charge made in said joint tariffs between the companies issuing the same. (See Record, page 6.)

Then follows the allegation:

> Your orators further aver that thereafter and since the year 1902, in order that there be no possible misconception of the meaning of the said tariffs and of the purpose of your orators in promulgating the same, there were inserted in the tariffs regularly issued, filed, published, and posted by your orators, as required by law, further provisions making clear the absolute segregation and separation of the charge in said tariffs for the transportation of live stock from the points of the origin of the shipments to a point of delivery on the lines of your orators in the city of Chicago, from the charge in said tariffs for the transportation and delivery of the said live stock beyond the tracks of your orators in the city of Chicago to the Union Stock Yards aforesaid.

The object of the change in the tariffs, as is shown, was not to change the facts, but to state the intention of the carriers more certainly.

Then follows (Record, p. 7) a copy of the tariff of the Chicago & Northwestern Railway, referred to as published since 1902, in pursuance of the plan to make certain, et cetera, in which it is stated that "a charge of two dollars will be made for the separate and special service of transporting such cars to the

Union Stock Yards * * * from this company's own rails," et cetera.

It is then alleged that similar provisions were inserted in the tariffs of other lines.

Then follows the allegation (see Record, p. 7):

> Your orators further aver that from the year 1894 to the present time there has been a segregation and separation under the tariffs of your orators for the transportation of live stock of the charge laid in the tariffs of your orators for the transportation from the points of the origin of the shipments to a point of delivery on the tracks of your orators in the city of Chicago, from the charge laid in said tariffs for the transportation and delivery of said live stock beyond the tracks of your orators in the city of Chicago and to the Union Stock Yards aforesaid, with the result that the charge laid in the tariff for the transportation of live stock from the points of the origin of the shipments to the point of delivery upon the tracks of your orators in the city of Chicago was laid and collected solely and exclusively for the service rendered in transporting such live stock from the points of the origin of the shipments to the point of delivery upon the tracks of your orators in the city of Chicago; and the charge laid in the tariffs for the transportation and delivery of live stock beyond the tracks of your orators and to the Union Stock Yards aforesaid was laid and collected solely and exclusively for the service of transporting such live stock beyond the tracks of your orators and delivering the same at the Union Stock Yards aforesaid.

It follows from these allegations that the claim that the service from their respective stations to the Union Stock Yards continues to be a gratuity except for the $2 paid, and that the through rate embraces no compensation for that part of the expense which the $2 fails to cover is asserted in the bill. Therefore there has been no change in the facts. The only change is in what the complainants assert in the tariffs.

It also follows that admittedly there has been no segregation and separation as to that part of the expense which the $2 does not cover. There is no basis for a claim of segregation except that part of the terminal service is a gratuity.

It also admittedly follows that the express purpose of levying the charge of $2 was not to pay for terminal or delivery service, but only "for the separate and special service of transporting cars to the Union Stock Yards from the company's own rails," thereby expressly excluding the claim that the $2 was for the delivery service to which the commission had reference in the findings that the total expense amounted to more than $2 per car. There is neither allegation nor proof that it costs $1 for the service which the new tariffs declare the $2 was laid to cover.

As will be observed from the second of the foregoing quotations, it is expressly alleged that the service which costs more than $2 per car is the service of "transporting cars of live stock beyond the lines of your orators in the city of Chicago to the Union Stock Yards aforesaid and there making delivery," but the

tariff quoted in the bill does not mention delivery, confining the $2 to "transporting."

As shown on page 59 of the record, in the opinion of the commission, the appellees herein insisted that the commission should reconsider its finding that the service performed to June 1, 1894, was not a gratuity. That has always been their major premise. The very contention that was made before the commission and was made before this court in the previous case is now alleged in the bill, that previous to the imposition of the terminal charge of $2 the service was a gratuity. Both this court and the commission held that it was embraced in the through rate. By the very admission of the appellees, therefore, it continues to be so embraced except so far as the $2 pays for it, and that is confined to transporting the cars only as alleged. The bill does not contend that the length of line to which the through rate has always applied has been changed by the tariffs. It contends that the tariffs never did apply beyond that point; that the practice was to deliver to the stock yards without compensation, and afterwards the two-dollar charge was made, not to pay for the whole of the terminal service but for a part of it.

The compensation was therefore not withdrawn from the through rate, and there has been no segregation, and the change of the tariffs limiting the $2 to certain specified parts of the service in no wise changes the facts as to segregation. It could not possibly exist, except that part of the service is gratuitous, which theory they continue to assert in the bill.

## II.

The claim that the Commission has investigated and reduced the terminal charge and also investigated and reduced the Chicago rate, mentioned on page 9 of Mr. Hines's brief, seems foreign to the case, but an examination of the opinion of the Commission in the case referred to, in connection with the two opinions of the Commission contained in the record, show the fact to be that the through rates naming the charge in cents per 100 pounds to the Missouri River markets, St. Louis, and Chicago, from portions of Texas, Oklahoma, New Mexico, and Colorado were examined by the Commission and held to be unreasonable, and at the same time the terminal charge as applied to those points, which were the points from which certain reductions had been made, was held to be unreasonable to the extent of $1 per car. The decision was perfectly consistent, because it left the roads the right to charge $1 per car as to those shipments.

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*Assistant to the Attorney-General.*
S. H. COWAN,
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